Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 78-1082

October Term 1978

GEORGE CONZEMIUS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, George Conzemius, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is attached hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on November 13, 1978. A timely petition for rehearing was filed, and denied on December 6, 1978. This petition is filed within 30 days of the latter date.

QUESTION PRESENTED

Whether the right to due process of law is violated in a conspiracy case when the jury is informed that the two co-defendants of the person on trial have already been convicted of the offense?

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

Petitioner, a Minnesota farmer and a former legislator, was indicted for and convicted of conspiracy and mail fraud along with two officers (Gilbertson and McCracken) of an elevator cooperative association (Hastings). The scheme alleged was that a company formed by the defendants, (Upper Midwest), would buy fertilizer from Hastings and re-sell it at a profit which rightly belonged to Hastings, and buy fertilizer elsewhere and sell it to Hastings at a higher price than Hastings need have paid. McCracken was Hastings' fertilizer manager, who did virtually all of the transactions; Gilbertson was Hastings' General Manager; Cozemius was a farmer-member of Hastings, but not an officer or employee. Conzemius signed all Upper Midwest checks as its treasurer, but was not shown to be aware of the company's receipts; he testified in his own defense that he had been informed and believed that the Hastings board of directors had been informed of and approved the dealings between Hastings and Upper Midwest, and that he did not intend to defraud. He was convicted on seven counts of mail fraud and one count of conspiracy and sentenced to eighteen months imprisonment.

At a pre-trial hearing the trial judge pointed out to counsel the potential effect on the jury if they should learn of the earlier convictions of co-defendants McCracken and Gilbertson and observed that "their names undoubtedly will come up during the trial as will evidence of their conviction," (Transcript, 22 Sept., 13-14), and that "there is no way to avoid . . . advising these jurors . . . of Gilbertson's and McCracken's conviction . . . . It is going to come out in trial." (Ibid, 16).

Both defense and government counsel expressed a desire not to "contaminate" or cause the "poisoning" of the entire

jury panel by questioning them about their extra-judicial knowledge of the earlier cases. (Ibid, 14-15).

Defense counsel Thomson agreed that some jurors may have heard of the convictions through publicity surrounding the previous trials, but asked: "[W]ould there be any reason why it would come ou[t] in the evidence necessarily." (Ibid). The court replied:

> "If McCracken testifies somebody is bound to ask him about it on cross-examination." (Ibid).

Government counsel Scott said:

> "I think in fact that . . . I could probably ask him about it on direct, Your Honor." (Ibid).

And the court responded:

> "You can. That is where it will come out, McCracken, Gilbertson or both." (Ibid, 16-17).

With this understanding, then, that both men would testify and their convictions would be revealed to the jury, everyone agreed that it would be best to tell the prospective jurors of this in order to determine if the evidence would affect their impartiality. Accordingly during voir dire the court told the jurors that:

> "[T]he eidence . . . may well indicate . . . that [Gilbertson's and McCracken's] case have been tried . . . and have resulted in verdicts of guilty as to various counts of the indictments as to each of them." (T., 34-35).

The court then advised the jurors not to follow the "natural inclination" to believe that since the others had been found guilty Mr. Conzemius must be guilty. No jurors responded

when asked if they would be unable to set those "facts" aside and try the case only on its merits. (T., 34-36).

As it happened, however, neither Gilbertson nor McCracken was called as a witness and no evidence of their convictions was received. In his summation, defense counsel referred to the jurors' knowledge that Gilbertson and McCracken had been convicted as one obstacle to applying the presumption of innocence, (T., 12 Oct., p. 8), and the court instructed the jury that the knowledge that the others had been convicted should not be allowed to affect their verdict as to Mr. Conzemius. (T., 12 Oct. 1977, containing the court's instructions, p.5, and see T., 1186-1187 for discussion of instructions).

The prejudicial effect of the knowledge of the alleged co-conspirators' convictions was asserted as ground for a new trial, (Transcript of Oct. 25, 1977, pp. 2-19), and the motion was denied on November 8, 1977.

The Court of Appeals affirmed, holding (in footnote 6) that defense counsel "acquiesced" in the judge's remarks and that the remarks were not prejudicial in view of the defense.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' perfunctory treatment of this issue does not do justice to its considerable importance, does injustice to defense counsel and thus to the petitioner (who were led to believe the co-defendants would testify for the government and their convictions be admissible), and conflicts with the better rule of other circuits reversing convictions in similar circumstances.

The record is clear that before trial counsel for both sides and the judge expected McCracken and Gilbertson to testify for the prosecution and that therefore their convictions would be properly in evidence. In the event, however, neither testified and their convictions were not admissible. That these disclosures were made in good faith (and nothing in the record suggests bad faith or deceit on anyone's part) does not in any way diminish the prejudicial impact of the evidence on the jury. By the same token, the lack of a specific objection by defense counsel clearly resulted from his clear understanding the two would testify, and the error thus cannot escape notice for an insufficient record. A lack of objection would not be dispositive in any case, under what we submit is the correct reasoning of *United States v. Harrell*, 436 F.2d 606 (5th Cir. 1970), where receipt of evidence of a co-defendant's conviction was held to be plain error, even though the co-defendant testified, testified (what is more) as a defense witness, and counsel neither objected nor requested a cautionary instruction (and the instructions given by the court were held to be inadequate to cure the error). See also *Trussel v. United States*, 278 F.2d 478 (6th Cir. 1960), for application of the plain error rule to an improper instruction on a co-defendant's guilty plea.

This case involved an alleged conspiracy and an alleged scheme; given the absence of evidence to show Mr. Conzemius' knowing entry or participation in an unlawful agreement, it certainly cannot be said that knowledge of the other alleged conspirators' and schemers' convictions did not appreciably influence the jury and affect the result. We emphasize, too, that the damage here cannot be seen as harmless merely because evidence of the convictions would have been admissible if Gilbertson and McCracken had testified. The court in *United States v. Womack*, 454 F.2d 1137 (5th Cir. 1972), reversed in a situation similar to ours, and distinguished for example *United States v. Aronson*, 319 F.2d 48 (2nd Cir. 1963), because in the latter one defendant changed his plea during trial and it was necessary to explain this to the jury.

We have here the isolated and damning fact of the co-conspirators' convictions, which could not be tempered by defense cross-examination, and which inescapably invited the jury to believe that their guilt implied this defendant's. (What this "evidence" amounted to was in effect hearsay evidence of the prior juries' opinions that the co-conspirators were guilty.) In this situation the court's instructions could not cure the prejudice; the court's remarks brought the damaging information to the jurors' attention, and, as has been vividly said, telling them then to ignore it was as effective as telling a child to sit in a corner and *not* think of a white elephant.[1]

[1] Judge Jerome Frank, dissenting in *United States v. Leviton*, 193 F.2d 848, 865 (2nd Cir. 1951), referring to the "futility" of the "ritualistic admonition" of instructions given to off-set prejudicial publicity. See also Mr. Justice Jackson, concurring in *Krulewitch v. United States*, 336 U.S. 440, 453 (1948): "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

Similar situations are dealt with in, at least, the following decisions: *Babb v. United States*, 218 F.2d 537 (5th Cir. 1955) (conviction reversed for allowing co-defendant to testify that he had pled guilty); *LeRoy v. Government of Canal Zone*, 81 F.2d 914 (5th Cir. 1936) (error to receive in evidence co-defendant's judgment of conviction); *Quig v. United States*, 33 F.2d 820 (3rd Cir. 1929) (reversible error for prosecutor to refer in opening statement to co-defendant's conviction); compare, *United States v. Rothman*, 463 F.2d 488 (2nd Cir. 1972) (finding no reversible error in the absence of objection); *United States v. Toner*, 173 F.2d 140 (3rd Cir. 1949) error to receive evidence of co-defendant's guilty plea); *United States v. Hall*, 178 F.2d 853 (2nd Cir. 1950) (error in instruction to the jury regarding co-defendant's guilty plea); and see Anno., "Admissibility of Statements of Co-conspirators Made After Termination of Conspiracy and Outside Accused's Presence," 4 ALR3d 671, at 709: "Co-conspirator's plea of guilty;" and Anno., "Prejudicial Effect of Prosecuting Attorney's Remarks, In Opening Statement to Jury, that Another Defendant Has Been Convicted or Has Pleaded Guilty," 48 ALR2d 1004, for numerous state decisions on the issue.

This Court has granted certiorari in *Parker v. Randolph*, 439 U.S. ——, (No. 78-99, 27 Nov. 1978), involving the related question of whether receipt in evidence of a co-defendant's statement from which the names of other defendants have been deleted violates the latter's rights under the doctrine of *Bruton v. U.S.*, 391 U.S. 123 (1968). The present issue is different, but it is similar in that it deals with the prejudicial effect to a defendant on trial of evidence of the incrimination of a co-defendant, and thus this case would be an appropriate one for the Court to review concurrently, to resolve an issue equally significant in the trial of criminal cases.

CONCLUSION

The Court should grant certiorari, or defer consideration of the petition pending the decision in *Parker v. Randolph*, and then dispose of the petition in light of that decision.

Respectfully submitted,

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Dated: January 2, 1979.

APPENDIX

(Opinion of Court of Appeals)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1983

UNITED STATES OF AMERICA,

Appellee,

vs.

GEORGE CONZEMIUS,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.

Submitted: June 15, 1978
Filed: November 13, 1978

Before LAY, HEANEY and ROSS, Circuit Judges.

LAY, Circuit Judge.

George Conzemius appeals his conviction following a jury trial on seven counts of mail fraud in violation of 18 U.S.C. § 1341 and one count of conspiracy to commit mail fraud in violation of 18 U.S.C. § 371.[1] On appeal he basically challenges the sufficiency of the evidence to show that he possessed sufficient knowledge or intent to commit the crimes charged. We affirm.

Defendant Conzemius was indicted with Ronald Gilbertson and Leonard McCracken for conspiracy and use of the mails in furtherance of a scheme to defraud the Hastings Co-op Elevator Association (Hastings) of profits from the sale

[1] His sentence was for 18 months.

of fertilizer through the use of two corporations, Upper Midwest Fertilizer, Chemical and Commodities, Inc. (Upper Midwest) and Rice County Fertilizer Company (Rice County).[2] Gilbertson was general manager of Hastings; McCracken was his assistant in charge of fertilizer. Conzemius was a member, but not an employee, of Hastings. Each was an owner and officer of Upper Midwest and Rice County.[3]

The scheme operated as follows: McCracken sold fertilizer from Hastings to third parties. The paper work proceeded through Upper Midwest and Rice County and those companies received most of the profits, which were more than $100,000 in the first four months. Sales of fertilizer to Hastings were also diverted through Upper Midwest such that Hastings paid a higher price and the corporation profited. Conzemius was treasurer of both corporations and the only person to sign company checks. Upper Midwest checks totaling more than $150,000 were paid to Hastings. Invoices and checks were transmitted through the mails. Hastings' directors did not know of Gilbertson's and McCracken's positions in the two corporations. Conzemius testified that he thought the two men had made full disclosures to Hastings.

Conzemius is a former school teacher and coach. He farms approximately 5,200 acres near Canon Falls, Minnesota, and, during the period in question, was the majority whip of the Minnesota State Senate. He testified in his own defense and

[2] The detailed facts of the overall fraudulent transactions are set forth in this court's earlier opinion wherein we affirmed the conviction of Leonard McCracken under the same counts of the indictment. *See United States v. McCracken*, No. 77-1966 (8th Cir. Aug. 15, 1978). We here need only outline the government's proof of the fraudulent scheme before discussing the evidence surrounding Conzemius' complicity.

[3] A fourth, unindicted individual, William Ammentorp, also shared in Rice County.

called several character witnesses, including Minnesota Governor Rudy Perpich, the lieutenant governor, a Minnesota district court judge, a minister, several state senators, farmers, teachers and businessmen.

Conzemius does not dispute that the various transactions took place at the times and in the manner and amounts recited in the indictment. He denies, however, that there ever existed any criminal conspiracy to violate the mail fraud statute and further denies any knowledge or unlawful intent on his part. He contends that there is no evidence that he agreed to, adopted, aided and abetted, or knew of, any false or fraudulent pretense or representation or promise or concealment of any material fact, or that he criminally conspired to do so, or that he caused any mailing for such a purpose. We cannot agree.

It is fundamental under federal decisions that

> A fraudulent scheme and conspiracy may be and usually is established by circumstantial evidence; by inferences from the evidence of relationship of the parties and by overt acts, conduct and other probative circumstances.

Isaacs v. United States, 301 F.2d 706, 724 (8th Cir.), *cert. denied*, 371 U.S. 818 (1962).

We fully agree with defendant's counsel that a defendant cannot be prosecuted for mail fraud through mere association or acquaintance with criminal conspirators. Our review of the record, however, convinces us that Conzemius was much more than an unknowing participant in a fraudulent scheme and that the evidence is sufficient to support the jury's verdict.

The Government's proof of the conspiracy and Conzemius' knowledge of the scheme may be briefly summarized from the following facts: (1) Conzemius and McCracken formed Upper Midwest and Rice County, which were used to divert sales and purchases of fertilizer from Hastings; (2) this activity began

immediately after the corporations were formed; (3) Conzemius knew that Gilbertson and McCracken were employed by Hastings and was well aware of their official positions in the cooperative; (4) the main business of the corporations was dealing in fertilizer; (5) the fertilizer transactions of the two corporations made extensive use of the mails; (6) Conzemius knew the fertilizer transactions were extremely profitable and that the price of fertilizer had greatly appreciated in 1973-74;[4] (7) Conzemius admitted knowledge of the transactions between Upper Midwest and Hastings as of July 8, 1974, although he denied knowledge of the specific transactions; (8) Barbara McCoy, who was hired to prepare all invoices for Upper Midwest, started work in Conzemius' basement on May 28, 1974, and at that time was shown how to prepare invoices by McCracken; Conzemius was present at this first meeting; although Conzemius denied specific knowledge of the invoice, it was at this time when McCoy prepared the first invoice for a sale of fertilizer to Hastings; (9) as financial officer of the two corporations Conzemius (a) had sole authority to issue checks on behalf of the corporations;[5] and

[4] Conzemius also knew the fertilizer market. His yearly fertilizer bill for his own farming operation averaged at least $250,000.

[5] As the Government's brief argues and the record reflects, Conzemius had complete financial control of the corporations. He hired bookkeepers and an accountant to keep records of the financial transactions. He was the treasurer of both corporations and every check issued required his personal signature. He could and, in fact, later did force Leonard McCracken, the president of Upper Midwest, out of the company from his position as treasurer. Though he knew when Upper Midwest had funds available to purchase a grain mill and a farm he testified that he did not review Upper Midwest's financial statements or documents he was submitting to banks, or the books of the corporation and hence did not know whom the corporation was dealing with. In his role as treasurer, Conzemius knew no later than July 8, 1974, that Upper Midwest was purchasing from Hastings because he signed the first of several large checks in payment to Hastings. He admitted that knowledge.

(b) negotiated a loan for $150,000 on behalf of Upper Midwest under conditions which severely discredited his claim of lack of knowledge. The loan was secured by Upper Midwest's accounts receivable and inventory. Conzemius submitted a signed financial statement for Upper Midwest, dated June 12, 1974, with accompanying documents showing fertilizer sales to Hastings.

From the foregoing evidence we conclude the jury properly could infer Conzemius' knowledge of the scheme from his positions in Upper Midwest and Rice County. In *United States v. West*, 549 F.2d 545, 551 (8th Cir.), *cert. denied*, 430 U.S. 956 (1977), we observed:

> It would strain credulity and defy logic to conclude that the key officer of a corporation would not be generally familiar with the financial affairs of the company and keep himself informed of its practices in obtaining funds necessary to operate business on a day-to-day basis. The district court properly considered the circumstance of [defendant's] position in the corporation in deciding the question of knowledge.

In addition Conzemius' claim of lack of knowledge is discredited by other testimony. Conzemius' assertion that he was familiar with the fertilizer transactions only in a general way is contradicted by his decision, prompted by an article in the Wall Street Journal, to revoke McCracken's authority to purchase fertilizer. The jury also could consider Conzemius' claim that he did not closely supervise Upper Midwest's activities with evidence indicating that he supervised his other farming activities daily. It is evident that the jury in returning a guilty verdict rejected Conzemius' explanation and the array of character witnesses who testified on his behalf.

The jury also had before it evidence of a series of check exchanges between the three defendants and Hastings. The record shows that in February 1975, Hastings was experiencing a liquidity crisis. It was approaching the legal loan limit of the Northwest Bank of Hastings, where it had maintained a checking account. All three defendants were shown to use a series of check exchanges with Hastings which attempted to maintain the balance of Hastings' checking accounts below the bank's loan limits. The Government's proof showed that the three men issued checks to Hastings, then Hastings issued checks for identical amounts back to them. The Government contends evidence of the check exchange was relevant to show an attempt to aid their overall scheme by keeping Hastings facially solvent to do business so that defendants could continue dealing with Hastings at their own enrichment. We agree with the trial court that the evidence was relevant. We think it further evidences the overall working relationship among the three conspirators and is relevant as well to show

knowledge by Conzemius of conduct in furtherance of the overall scheme to continue the unlawful transactions.

The judgment of conviction is affirmed.[6]

A true copy.

Attest:

Clerk
U.S. Court of Appeals
Eighth Circuit.

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[6] Conzemius also raises three other grounds for reversal: (1) that the trial court erred on voir dire in informing the jurors that Ronald Gilbertson and Leonard McCracken previously had been found guilty in separate trials as to the same counts of the indictment; (2) that statements of Gilbertson and McCracken were improperly admitted as being coconspirators' statements; and (3) that certain check exchanges by Conzemius, Gilbertson and McCracken and Hastings were improperly admitted since they were not relevant to proof of any fraud. None of these contentions has any merit.

First, Conzemius' counsel clearly acquiesced in the trial court's voir dire of the jury. The court's inquiry of the prospective jury instructed the jury to disregard any possible connection between Gilbertson's and McCracken's guilt and the trial involving Conzemius. Under our decisions the trial court did not err. *See Gerberding v. United States*, 471 F.2d 55, 60 (8th Cir. 1973); *Koolish v. United States*, 340 F.2d 513, 529-31 (8th Cir.), *cert. denied*, 381 U.S. 951 (1965). Furthermore, Conzemius' defense was based on his lack of knowledge of McCracken's and Gilbertson's unlawful conduct. Under the circumstances, if the jury were to believe Conzemius the fact that McCracken and Gilbertson were guilty would not be prejudicial to that defense.

Second, there clearly was strong circumstantial evidence proving a conspiracy. Under these circumstances the trial court properly allowed evidence of the out-of-court statements of both Gilbertson and McCracken.

Finally, as previously discussed, there can be little argument that the trial court abused its discretion in finding the check exchange relevant. Assuming, however, as Conzemius urges, this check exchange was nothing more than short term loans to Hastings, its admission into evidence, if not relevant, hardly can be deemed so prejudicial as to constitute reversible error.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1082

GEORGE CONZEMIUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was denied a fair trial because the court informed the jury that two of his alleged co-conspirators had been convicted of the offenses for which petitioner was being tried.

Following a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted of seven counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371. He was sentenced to 18 months' imprisonment (Pet. App. A-1 & n.1).

The government's evidence showed that petitioner conspired with Ronald Gilbertson and Leonard McCracken to defraud the Hastings Cooperative Elevator Association of profits from the sale of fertilizer. Gilbertson and McCracken were key employees of Hastings Cooperative, and petitioner was a member of the

cooperative. Petitioner, Gilbertson, and McCracken were also the officers and owners of two other corporations; these two corporations bought fertilizer from third parties and resold it to Hastings Cooperative at a higher price than the cooperative would have paid had it purchased the fertilizer directly from the third parties (Pet. App. A-2). Petitioner, Gilbertson, and McCracken also arranged for the two corporations to act as middlemen in Hastings Cooperative's sales to third parties, and the two corporations received the bulk of the profits on these transactions (*ibid.*).

The court of appeals properly concluded (Pet. App. A-7 n.6) that the district court did not err in informing the jury during voir dire, without objection, that petitioner's co-conspirators, Gilbertson and McCracken, had been convicted of the offenses for which petitioner was being tried. During a pretrial conference, the district court discussed with petitioner's counsel the expectation that since McCracken and Gilbertson had been referred to in the indictment, their names were likely to be mentioned during the course of the trial (H. Tr. 13).[1] The court expressed concern that petitioner might be prejudiced because McCracken's and Gilbertson's cases had received "some publicity," and jurors might therefore be aware of their convictions (H. Tr. 13-14). The court also commented that if McCracken and Gilbertson testified, as expected, their convictions could be properly brought out (H. Tr. 16-17).[2] Petitioner's attorney agreed that some of

[1]"H. Tr." refers to the transcript of the pretrial hearing held on September 22, 1977.

[2]As petitioner acknowledges (Pet. 6), although McCracken and Gilbertson ultimately did not testify, and no evidence of their convictions was received, "before trial counsel for both sides and the judge expected McCracken and Gilbertson to testify for the prosecution and that therefore their conviction would be properly in evidence." Petitioner also concedes (*ibid.*) that "nothing in the record suggests bad faith or deceit on anyone's part."

the prospective jurors might have learned of the co-defendants' convictions from the publicity (H. Tr. 14, 16). He also agreed with the court's proposal to question prospective jurors individually about their knowledge of McCracken's and Gilbertson's cases, and to instruct them that they must determine petitioner's guilt or innocence solely on the basis of the evidence at trial without regard to the outcome of the co-defendant's cases (*id.* at 14-15).

Accordingly, during voir dire the court stated that there might be evidence at trial that other defendants had been tried and found guilty "as to various counts of the indictment," but that each defendant's guilt or innocence must be decided separately, and that the jury must not draw any inference that petitioner must be guilty if his co-defendants were (I Tr. 34-35). The court then asked whether any of the prospective jurors believed he would be unable to set aside his knowledge of any such facts and decide the case solely on the evidence introduced at trial, and no juror responded (I Tr. 35). The court also individually questioned each prospective juror who stated that he had read or heard about the charges against petitioner and his co-defendants in an effort to determine whether their verdict might be influenced (I Tr. 37-39, 54-84). In its closing instructions the court reminded the jury of its admonition that the co-defendants' convictions could not affect their verdict in petitioner's case, and that petitioner was "entitled to a fair and separate determination" of his guilt or innocence (Tr. Jury Instructions 5).[3]

In these circumstances, there is no merit to petitioner's contention that he is entitled to a new trial because the jury was informed of his co-defendants' convictions. Although a co-defendant's conviction may not be introduced as evidence of the defendant's guilt, a defendant is not deemed to have been prejudiced when the

[3]"Tr. Jury Instructions" refers to the separately bound and paginated transcript of the court's instructions to the jury.

fact of such a conviction is revealed for some other purpose, provided the jury is given a cautionary instruction. See, *e.g., United States* v. *Wiesle,* 542 F. 2d 61, 62-63 (8th Cir. 1976); *United States* v. *Bryza,* 522 F. 2d 414, 424-425 (7th Cir. 1975), cert. denied, 426 U.S. 912 (1976); *United States* v. *Davis,* 487 F. 2d 112, 120 (5th Cir. 1973), cert. denied, 415 U.S. 981 (1974); *United States* v. *Rothman,* 463 F. 2d 488, 490 (2d Cir. 1972); *Koolish* v. *United States,* 340 F. 2d 513, 529-531 (8th Cir. 1965); *United States* v. *Aronson,* 319 F. 2d 48, 51-52 (2d Cir. 1963).[4]

Here, the fact of the co-defendants' convictions was not introduced as evidence of petitioner's guilt. The trial court informed the jury panel of the co-defendants' convictions in an effort to ensure that pretrial publicity about their cases did not prejudice petitioner, and to anticipate and prevent the jury's drawing any inference of petitioner's guilt if, as anticipated, evidence of the co-defendant's convictions were introduced. The court gave several careful cautionary instructions.

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[4]The cases petitioner relies upon (Pet. 6-7), in contrast, involved either a district court's failure to give a cautionary instruction (*e.g., United States* v. *Harrell,* 436 F. 2d 606, 614 (5th Cir. 1970)), or an erroneous instruction that permitted the jury to consider a co-defendant's conviction as evidence of the defendant's guilt (*e.g., Trussell* v. *United States,* 278 F. 2d 478, 480 (6th Cir. 1960)). And in *United States* v. *Womack,* 454 F. 2d 1337, 1346 (5th Cir. 1972), the court of appeals concluded that the trial judge had not been justified in overruling the defendant's objection and informing the jury that Womack's co-defendants had each been found guilty by a jury. In contrast to the present case, it was not anticipated that evidence of these convictions would be introduced at trial or might already be known by the jury, and the court informed the jury of the convictions simply to explain why they were named in the indictment but not on trial with Womack. The court found the mention of the prior convictions especially serious because "the guilt of each defendant is closely tied to that of the others." 454 F. 2d at 1346. Here, however, petitioner's defense did not depend on a showing that McCracken and Gilbertson were innocent.

We believe it would have been preferable for the trial judge to wait until a reference to the co-defendants' convictions was made at trial before giving a cautionary instruction. Nevertheless, as the court of appeals emphasized (Pet. App. A-7 n.6), petitioner's counsel was informed of the trial court's proposed plan of action, and he interposed no objection. The failure of petitioner's counsel to object to this procedure may well have been the result of his recognition that in the circumstances of this case the jury's knowledge of the co-defendants' convictions would not be prejudicial, since petitioner's defense was not based on an assertion of McCracken's and Gilbertson's innocence, but rather on the theory that petitioner had been unaware of McCracken and Gilbertson's fraudulent scheme. Since petitioner acquiesced in the procedure followed by the trial court and suffered no prejudice, he is not entitled to a new trial, and further review by this Court is not warranted.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[5]There is no reason to defer decision of this case until the Court decides *Parker* v. *Randolph,* No. 78-99, certiorari granted November 27, 1978, which presents the question whether the admission at a joint trial of out-of-court confessions by three co-defendants who did not testify violated the rights of the defendants other than the declarants to confront the witnesses against them. That question is not presented in the instant case.

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